



Having reviewed the whole evidentiary record filed herein and, in addition, the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant began his employment with respondent on February 11, 1993, as a break press operator. This job required continuous motion and repetitive movement of claimant's hands and wrists. On approximately March 19, 1993, claimant began experiencing hand problems associated with his job. By the following Monday he was beginning to drop things and was noticing a loss of grip. On March 28, 1993, claimant went to the emergency room at Great Bend Medical Center where he was examined by Dr. Richard L. Vopat. Dr. Vopat, board certified in emergency medicine and internal medicine, examined the claimant, prescribed splints and referred claimant to a neurologist. Medical records placed into evidence from the emergency room indicate the claimant's hands had been falling asleep for approximately a year. Another place on the form indicated claimant's problems had been ongoing for "a while." Dr. Vopat did indicate claimant was currently concerned because he had recently begun dropping things and losing his grip. The claimant did inquire of Dr. Vopat if he felt his problems were work related, but the doctor did not remember providing an opinion in that regard.

Claimant was examined by Dr. Mark Melhorn, a board-certified hand specialist, on July 13, 1993. Dr. Melhorn obtained a history from the claimant, indicating an onset of symptoms in March 1993, followed by night awakenings and difficulty while riding his bicycle. Dr. Melhorn diagnosed possible bilateral nerve entrapment which was confirmed by EMG. Discussion regarding claimant's options included conservative care and surgery. Claimant elected surgery which was scheduled, but then delayed due to the respondent's denial of benefits, alleging claimant's problems did not arise out of and in the course of his employment. Dr. Melhorn, when asked regarding the connection between claimant's conditions and his employment, advised that claimant's symptoms were a combination of age, gender, genetics, the work place and other nonwork place factors. He stated the work would contribute to claimant's problems. Dr. Melhorn felt claimant's bilateral upper extremity problems would not be caused within claimant's short employment duration of only 21 days. He did state that if claimant were predisposed to this condition, work would contribute to claimant's symptomatology.

K.S.A. 1992 Supp. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The phrase "out of" points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment; it arises out of the nature, conditions, obligations and incidents of employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

The phrase "in the course of" relates to the time, place and circumstances under which the accident occurred and means the injury happened while a workman was at work in his employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984). The evidence in this case is that claimant, while employed with respondent, aggravated what may have been a preexisting propensity for bilateral upper extremity symptomatology. The only evidence in this case specifically dealing with whether or not claimant aggravated his symptoms at work is that of Dr. Mark Melhorn. While Dr. Melhorn does emphatically state that claimant's condition could not be caused in the short employment period in question, he does go on to say that claimant's condition could be contributed to or aggravated by his employment. Accidental injuries are compensable where the accident only serves to aggravate or accelerate an existing disease or intensifies an affliction. Kauffman v. Co-operative Refinery Assn., 170 Kan. 325; Syl. 4, 225 P.2d 129 (1950).

The medical evidence of Dr. Melhorn supports a finding by the Appeals Board that claimant's bilateral upper extremities symptomatology was aggravated by his employment with respondent, thus making it compensable. The Appeals Board reverses the Administrative Law Judge's denial of benefits in this matter.

While the Appeals Board has in the past remanded cases back to Administrative Law Judges where issues were not decided at the administrative level, in this instance, the nature and extent of injury and claimant's entitlement to future medical, while not decided by the Administrative Law Judge, are essentially uncontroverted in the record. Only two medical depositions were taken in this case. Dr. Vopat gave no opinion regarding claimant's functional impairment. Dr. Melhorn, on the other hand, rated claimant at 9.45 percent to each forearm, which combines to a 10 percent whole body functional impairment. No evidence of work disability was submitted by either party. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as expressed by competent medical evidence. K.S.A. 44-510e.

Dr. Melhorn further testified of the claimant's additional need for treatment in the future. As was earlier noted, Dr. Melhorn had scheduled claimant for surgery when the respondent raised its objection regarding whether claimant's injury arose out of and in the course of his employment. Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy and is ordinarily regarded as conclusive. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). Claimant is entitled to future medical treatment upon application and approval by the Director.

The Appeals Board finds the medical opinion expressed by Dr. Melhorn to be competent evidence and adopts same in awarding claimant a ten percent (10%) whole body functional impairment.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson of November 1, 1994, is reversed and claimant is granted an award against respondent and its insurance carrier for a 10% whole body functional impairment based upon an average weekly wage of \$236.67. Claimant is entitled to 415 weeks permanent partial general body disability at the rate of \$15.78 per week for a total award of \$6,548.70.

As of May 26, 1995, claimant would be entitled to 113.57 weeks permanent partial disability compensation at the rate of \$15.78 per week, totaling \$1,792.13.01, paid in one lump sum, minus any amounts previously paid, followed thereafter by 301.43 weeks permanent partial general body disability at the rate of \$15.78 per week, totaling \$4,756.57 to be paid out until fully paid or until further order of the Director.

Claimant is further awarded future medical upon application to and approval by the Director.

Claimant's contract for employment with his attorney is hereby approved insofar as it is not in contravention of K.S.A. 1992 Supp. 44-536.

Fees necessary to defray the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

**OWENS, BRAKE & ASSOCIATES**

|  |           |
|--|-----------|
| Preliminary Hearing Transcript<br>Dated May 19, 1993 | \$ 190.87 |
|--|-----------|

|  |           |
|--|-----------|
| Regular Hearing Transcript<br>Dated June 8, 1993 | \$ 107.21 |
|--|-----------|

|  |           |
|--|-----------|
| Deposition of Dr. Richard Vopat<br>Dated July 28, 1994 | \$ 162.02 |
|--|-----------|

**SATTERFIELD REPORTING SERVICES**

|   |           |
|---|-----------|
| Deposition of Dr. Mark Melhorn<br>Dated June 30, 1994 | \$ 102.60 |
|---|-----------|

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 1995.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Russell B. Cranmer, Wichita, KS  
Mickey Mosier, Salina, KS  
George R. Robertson, Administrative Law Judge  
George Gomez, Director